The Burden of Being “Safe”

Tobias Crone 2020-10-01T11:00:54

Responsibility sharing in the field of migration and asylum has become one of the most contentious issues within the European Union (EU). Southern European countries claim that the current system – based on the Dublin-Schengen duo – is fundamentally unbalanced, as they end up bearing the main responsibilities in terms of both border and migration control, and asylum seekers’ reception and protection. These claims are linked to calls either for more European integration and solidarity or for an enhancement of national sovereignty.

Despite tensions between these different stances, there has been a practical convergence in the response to the 2015 so-called “migration crisis”. The EU and its member states have decided to move from the externalisation of migration control to the externalisation of protection responsibilities. They have promoted the shifting (rather than sharing) of the “asylum burden” further south – i.e. from southern European countries to third countries in the EU’s southern neighbourhood or in the Global South.

This goal has been pursued through recourse to informal migration cooperation agreements – and in particular through the incorporation of the safe third country (STC) and first country of asylum (FCA) concepts into these deals, which allows member states to shift to third countries the responsibility for examining asylum applications and providing protection.

Indeed, cooperation on migration management has been recently characterised by a process of “informalisation”, most prominently in relation to readmission, which saw the proliferation of informal agreements of a dubious legal nature – particularly from a rule of law perspective. This expansion has been two-fold. First, the use of informal agreements has expanded from the national level to the EU level. Second, the informalisation of cooperation with third countries has extended to include not only migration and border management, but also asylum management. This post aims to analyse both expansive shifts, highlighting their impact on international responsibility sharing mechanisms and the protection of asylum seekers’ fundamental rights.

The EU’s Shift Towards Informalisation

European countries have a long history of bilateral cooperation with countries of origin and transit in the area of migration, border control and readmission, established since the nineties through both traditional international treaties and informal arrangements. Conversely, with migration and asylum becoming an area of shared competence further to the changes introduced by the Treaty of Amsterdam in 1999 – including the external dimension of migration policy-making – the EU started focusing on the negotiation of traditional international treaties with third countries, especially EU readmission agreements (EURAs). However, the

relatively limited results achieved in practice and the desire to have more effective forms of cooperation with countries of origin and transit, especially in the southern neighbourhood, has led to an increased reliance on informal migration deals also at EU level. Following the example and building upon the experience of some member states, the Commission has increasingly promoted the recourse to non-traditional instruments of cooperation to substitute, complement, integrate or set the bases for formal agreements, with the purpose to make cooperation on migration management work in practice.

The first signs of the EU's shift towards non-traditional instruments of cooperation, particularly with Mediterranean countries, emerged after the 2011 Arab uprisings, when the EU resorted to Mobility Partnerships as an instrument to establish cooperation on migration management with North African countries, rather than pushing forward with EURAs negotiations. However, this informalisation trend became evident and widespread following the 2015 "migration crisis". Since the adoption of the European Agenda on Migration in May 2015, Commission and Council official policy documents have increasingly acknowledged (and explicitly politically validated) a new cooperation strategy with third countries based on informal agreements, working arrangements and political dialogue rather than traditional international agreements.

The Commission Communication on an EU Action Plan on Return of September 2015 marked a radical change in the Commission's approach to readmission. Without neglecting the importance of formal EURAs, the document focuses on the improvement of operational cooperation on a practical (even bilateral) level and the use of political dialogue and other policy instruments to obtain more from third countries. But the most clear and explicit acknowledgment of a shift towards informal cooperation is included in the Council Conclusions on the Expulsion of Illegally Staying Third-Country Nationals of 11 May 2016. Here, the Council affirmed that,

in addition to readmission agreements, legally non-binding working arrangements on identification, return and readmission could be established with third countries at EU level, pertaining in particular to own nationals and including the holding of regular, informal meetings at expert level to review implementation and address possible obstacles.

In its Communication on Establishing a New Partnership Framework with Third Countries of 7 June 2016, the Commission confirmed the approach promoted by the Council and reaffirmed that "the paramount priority is to achieve fast and operational returns, and not necessarily formal readmission agreements". The New Partnership Framework represented a milestone for the EU external migration policy and clearly marked the "informal turn" of the EU cooperation policies in the area of migration, in particular (but not exclusively) towards African countries.

Under the umbrella of the New Partnership Framework, various types of informal arrangements have been negotiated and concluded at the EU level – including the Joint Declaration on Ghana-EU Cooperation on Migration (2016), the Joint Way Forward on Migration Issues between Afghanistan and the EU (2016), and the Standard Operating Procedures between the EU and Bangladesh for the

Identification and Return of Persons without Authorisation to Stay (2017). Moreover, the Commission has concluded a number of informal readmission agreements – relabeled as Good Practices for the Efficient Operation of the Return Procedure – with several sub-Saharan countries, including Guinea (2017) and Ethiopia, Gambia and Ivory Coast (2018).

The Commission has been very careful to always mention in its policy documents and in the text of the arrangements that these are "non-legally binding" instruments. The purpose is to differentiate them from formal international treaties, whose adoption would require following the procedure set out by Article 218 TFEU, including the democratic scrutiny of the European Parliament.

From Migration Management to Asylum Management: Labelling a Third Country as "Safe"

Since the 2015 "migration crisis", the EU and its member states have tried to outsource to third countries the responsibility not only over border and migration control but also over readmitting asylum seekers, examining asylum applications, providing reception and protection to forced migrants. This additional externalisation objective is mainly pursued through the recourse to informal agreements. While formal readmission agreements can only apply to unauthorised migrants and can never apply to asylum seekers, informal agreements tend to associate different legal statuses – including potential beneficiaries of international protection – to a single catch-all category of "migrants not having the right to enter the EU".

An emblematic example of the expansion of the scope of EU informal deals from migration management to asylum management is the EU-Turkey Statement of 18 March 2016. Under this notorious deal, readmission applies to everyone crossing over from Turkey to the Greek islands – a majority being Syrian and Afghan asylum seekers. The people targeted and actually affected by the implementation of this agreement, therefore, are mainly persons who try to reach the EU to seek protection, rather than irregular migrants or rejected asylum seekers.

The readmission to Turkey of persons who would probably qualify as beneficiaries of international protection in Europe is possible (and deemed compatible with EU and international law) based on the controversial assumption that Turkey is a "safe country" for them. This assumption is grounded on the application of the concepts of "safe third country" (STC) or "first country of asylum" (FCA) as set out, respectively, by Article 38 and Article 35 of the Asylum Procedures Directive (APD).

However, as argued in the analysis "Why Turkey in Not a 'Safe Country'", Turkey could hardly be considered a STC, for a number of reasons – most notably because under the Turkish legal framework on asylum it is not possible for a non-European asylum seeker to request refugee status, be recognised as a refugee, and receive protection in accordance with the Geneva Convention. Conversely, Turkey could be considered a FCA based on the APD definition, because it does foresee alternative forms of protection for non-European asylum seekers – i.e. a so-called "conditional" refugee status or subsidiary protection for non-European asylum seekers and a

special “temporary protection” for Syrians. Nonetheless, Greek authorities need to determine through an individual assessment of each applicant’s case whether the protection granted by Turkey qualifies as sufficient. Article 35 APD does not provide a definition of “sufficient protection”; it simply requires that the person concerned benefits from the principle of *non-refoulement* – which is not always respected by Turkey, as repeatedly reported by NGOs. Still, UNHCR argued that it follows from the text, context, object and purpose of Article 35 that “sufficient protection” goes well beyond protection from *refoulement*.

Following the EU-Turkey Statement, European leaders have often referred to that agreement as a model that could be replicated with countries in North Africa in order to stem migration across the Central Mediterranean route. The EU and some member states have actually engaged in negotiating (in a more or less public and transparent way) similar deals with countries like Tunisia, Libya and Egypt.

Interestingly, in its attempts to outsource the “asylum burden” to non-European countries, the EU is pursuing a dual strategy. On the one hand, it seeks to negotiate an externalisation of asylum responsibilities by means of informal agreements, in order to facilitate states that may have an interest in cooperating but are reluctant to commit to a strict international regulatory framework. On the other hand, the EU seeks to provide a legally sound legitimacy to the externalisation of protection responsibilities, by trying to incorporate the legal concepts of safe country of origin, safe third country and first country of asylum in these informal deals.

There seems to be a tension between, on the one hand, the need to secure a deal through an instrument which allows to avoid the formalities that are typical of international agreements, and on the other hand, the need to provide a formal legal basis to the responsibility-shifting mechanism that the informal deal aims to establish. Perhaps, by providing a legal validation to such burden-shifting mechanisms, European decision-makers aim to both make them acceptable to the public opinion, and avoid they are struck out by EU or international courts.

The Impact of Informal Agreements on International Responsibility Sharing

The most recent (and worrying) trend in the EU’s externalisation strategy consists in negotiating with third countries informal deals, which aim to prevent asylum seekers from entering the territory of the EU and delegate third countries to provide protection. We are witnessing an extension of extraterritorial exclusion, political distancing and the deferral of moral responsibility, with asylum seekers at the edges of the EU being funneled to more dangerous and remote locations outside the EU. This raises profound questions over the appropriateness, effectiveness and desirability from a human rights perspective of the EU’s responses to the “migration crisis”.

The increasing use of informal agreements on the part of both the EU and its member states has contributed to move cooperation on migration management away from international agreements, eschewing the oversight of democratic institutions,

judicial authorities and public opinion. Typically, recourse to informal instruments of cooperation has been justified through an emergency rhetoric, which linked these instruments to an alleged “crisis” – as in the case of the EU-Turkey Statement. However, in this and other cases, the forced return not only of irregular migrants but also of potential asylum seekers to the country of origin or transit is carried out without a proper consideration of the capacity *de iure* and *de facto* of the country concerned to protect the fundamental rights of returnees.

There is an urge to investigate the human rights implications of the EU’s increased reliance on externalisation tools operating in the shadow of the law and, more worryingly, eschewing the rule of law. Furthermore, informal migration agreements have the potential to jeopardize the international protection regime as a whole. In particular, by shifting the “asylum burden” to third countries, informal deals risk to perpetuate or exacerbate the already unbalanced distribution of refugees between the Global South and the Global North.

(cc) BY-SA